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SEXUAL ORIENTATION AND LEGAL RIGHTS

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ISSUE DEFINITION

Recent years have seen considerable judicial and political activity with respect to the legal rights of lesbians and gay men in Canadian society. This reflects both changes in societal attitudes towards the whole issue of homosexuality, and increased advocacy by gay and lesbian organizations and individuals. The introduction of the *Canadian Charter of Rights and Freedoms* dramatically changed the legal environment. Most Canadian jurisdictions have enacted legal protection against discriminatory treatment. At the same time, numerous challenges against allegedly discriminatory laws and asserting legal rights have been mounted in the courts. The resulting decisions help to throw some light on the legal position of gay men and lesbians, and have provided a focus for the political debate.

There are two basic legal aspects to the issue of sexual orientation: one is the prohibition of discrimination on the basis of sexual orientation, which is primarily designed to ensure that lesbians and gay men are not discriminated against as individuals; the second involves the recognition of same-sex relationships, and the extension to homosexual partners of benefits and rights equivalent to those accorded to heterosexual partners.

This paper will review some of the legal issues related to sexual orientation in Canada. The emphasis will be on the federal level and Parliament, but reference will also be made to developments at the provincial and local levels, as well as in the private sector. The paper is concerned only with legal developments and issues. Homosexuality raises a great many other issues -- religious, socio-cultural, and moral. The policy issues and choices that are involved with gay and lesbian rights are more properly addressed elsewhere.

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* The original version of this Current Issue Review was published in October 1992; the paper has been regularly updated since that time.

BACKGROUND AND ANALYSIS

A. Discrimination on the Basis of Sexual Orientation

Human rights legislation is designed to prohibit and eradicate the more invidious forms of discrimination based on the personal characteristics of a group or individual. Laws in themselves cannot change public attitudes. Prohibiting discrimination does not mean that particular groups or individuals must be universally liked or their behaviour or attributes universally condoned. Human rights legislation is fundamentally concerned with fairness; it recognizes that certain groups in society are not treated equally, and establishes that society considers this to be unacceptable.

Human rights legislation sets out a list of characteristics against which discrimination is prohibited, customarily in employment, accommodation and services. Although these characteristics differ slightly from one jurisdiction to another, there is a great deal of similarity in those that are enumerated. In Canada, these have traditionally included: race, colour, national or ethnic origin, religion or creed, age, sex, family and/or marital status, and mental or physical disability.

Prior to the 1980s, a very small number of cases were brought in Canadian courts alleging discrimination on the basis of sexual orientation. Most of these were not successful, in part because at that time there were few if any legal rights or provisions that could be invoked in most jurisdictions, and in part because of resistance or hostility from judges. Attempts to argue that sex as a prohibited ground of discrimination included sexual orientation were unsuccessful.

The legal situation in Canada changed considerably with the introduction of the *Canadian Charter of Rights and Freedoms* in 1982, and specifically with the coming into effect of the equality rights provision in section 15 in 1985. Efforts had been made when the Charter was being drafted to include sexual orientation as one of the prohibited grounds of discrimination, although it was ultimately decided not to include it specifically. Section 15 was worded, however, in such a way as to ensure that the prohibited grounds of discrimination were open-ended:

> (1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is clear from the wording of this provision that it contains a non-exhaustive listing of the grounds of discrimination; the grounds specifically set out are historically and legally the most commonly recognized, but the list is not a closed one.

The courts have accepted that section 15 is to be interpreted broadly, and that "analogous" grounds, that is, personal characteristics other than those listed, may also form the basis for discriminating against a group or individual and are entitled to protection under the section (*Andrews* v. *Law Society of B.C.*). Most courts that have dealt with the issue have ruled that sexual orientation is such an "analogous" ground, and is therefore a prohibited ground of discrimination. In fact, counsel for the Attorney General of Canada, and for some provincial Attorneys General, have formally admitted in several cases that sexual orientation is a ground of discrimination covered by section 15. In May 1995, this view was confirmed by the Supreme Court of Canada in the *Egan and Nesbit* decision discussed under heading B. (Same-Sex Spouses).

Even if discrimination on the grounds of sexual orientation is found to be a *prima facie* violation of the equality rights provision of the Charter, however, that finding must stand up to analysis under section 1, which provides that Charter rights and freedoms are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In other words, while section 15 prohibits discrimination or discriminatory laws and treatment on the basis of sexual orientation, it is still possible that such laws could be upheld as justifiable under section 1.

Another difficulty with relying on the Charter as the sole vehicle for the validation of equality rights is that its constitutional guarantees apply only to governmental action. In addition, in most instances Charter remedies must be pursued through the courts, a process that is costly, time-consuming and entails an adversarial approach. Human rights statutes, on the other hand, provide administrative schemes for dealing with a wide variety of complaints of discrimination in the public and private spheres; such mechanisms are relatively

inexpensive and, ideally, expeditious, when compared to court proceedings. For these reasons - and others - human rights commissions and advocates, as well as lesbian and gay activists, have stressed the importance of including sexual orientation as an enumerated ground of discrimination in human rights legislation.

The Canadian Human Rights Commission has, since 1979, recommended that sexual orientation be made a prohibited ground of discrimination under the *Canadian Human Rights Act*. In 1985, the House of Commons Standing Committee on Justice and Legal Affairs established a Sub-Committee on Equality Rights, which conducted a comprehensive study of section 15 of the Charter, and the effect of its equality provisions on existing laws and disadvantaged groups. The Sub-Committee's Report, entitled *Equality for All*, was tabled in October 1985. It, too, recommended that the *Canadian Human Rights Act* be amended to add sexual orientation as a prohibited ground of discrimination. As the Sub-committee explained:

> Although we have concluded that "sexual orientation" should be read into section 15, we do not believe that this interpretation fully protects homosexuals in those situations where the equal protection of the law should prevail -- as in employment, accommodation, and access to services. Thus we turn to the *Canadian Human Rights Act*. ....
>
> Sexual orientation is no more relevant to a person's fitness to compete for a given job or reside in particular accommodations than sex, race or religion. Because sexual orientation is a personal matter, it should not be a criterion in determining the availability of services, facilities, accommodations or employment to Canadians. (p. 29)

In *Toward Equality*, its 1986 response to the Sub-Committee's Report, the federal government recognized that the issue of sexual orientation ranked among the most difficult moral and religious concerns of Canadians, and that there was no simple manner of reconciling deeply felt opposite views. It went on to conclude, however:

> The Government believes that one's sexual orientation is irrelevant to whether one can perform a job or use a service or facility. The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees in section 15 of the Charter. The Government will take whatever measures are

> necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction. (p. 13)

In September 1991, the Charter's impact on human rights legislation was evidenced when McDonald J. of the Ontario Court of Justice concluded, in *Haig* v. *Canada*, that the absence of sexual orientation from the list of proscribed grounds of discrimination in section 3 of the *Canadian Human Rights Act* violated section 15 of the Charter. In August 1992, the Ontario Court of Appeal dismissed the federal government's appeal of this decision. It held that the Act's failure to provide homosexuals with access to redress for discriminatory treatment, and the resulting inference that such treatment was acceptable, had a discriminatory effect that violated section 15 of the Charter. The Court determined that from then on section 3 of the Act should be read and applied as if sexual orientation were listed as a prohibited ground of discrimination; that is, sexual orientation should be "read in" to the Act.

The federal government decided not to appeal this decision and indicated that the Court of Appeal's ruling, although binding only in the province of Ontario, would be applied throughout Canada. Accordingly, the Canadian Human Rights Commission has been accepting complaints based on sexual orientation since 1992; to date, over 200 such complaints have been filed. In addition, in January 1994 a Canadian Human Rights Tribunal appointed under the Act issued its first decision upholding a complaint explicitly alleging discrimination on the basis of sexual orientation, and ordered a Vancouver-based group to stop using recorded telephone messages promoting hatred toward homosexuals. In February 1996, the Federal Court dismissed an application to set aside the tribunal decision (*McAleer* v. *Canada (Human Rights Commission)*).

In June 1996, Parliament enacted Bill C-33, An Act to amend the Canadian Human Rights Act. By amending the federal anti-discrimination statute to include sexual orientation among its prohibited grounds of discrimination, Bill C-33 had the effect of codifying the law as stated in the Ontario Court of Appeal's *Haig* decision and since practised by the Canadian Human Rights Commission and Canadian Human Rights Tribunal(s). This development is more fully reviewed below under the heading Parliamentary Action.

The amendment to the *Canadian Human Rights Act* also brought the federal Act into line with existing laws at the provincial level, where considerable legislative activity has

taken place over the past 20 years. Quebec became the first Canadian jurisdiction to include sexual orientation as a prohibited ground of discrimination when the province's *Charter of Human Rights and Freedoms* was amended in 1977. Currently, human rights Acts and Codes in eight jurisdictions prohibit discrimination on the basis of sexual orientation: Quebec, Ontario, Manitoba, Yukon Territory, New Brunswick, Nova Scotia, British Columbia, and Saskatchewan. In addition, the Newfoundland Human Rights Commission has for some time accepted complaints of discrimination based on sexual orientation. In August 1995, the Supreme Court of Newfoundland ruled, as the Ontario Court of Appeal had done in *Haig*, that the omission of sexual orientation from the province's *Human Rights Code* was in itself discriminatory under section 15 of the *Canadian Charter of Rights and Freedoms*, and reinforced negative stereotyping of homosexuals (*Newfoundland (Human Rights Commission* v. *Newfoundland (Minister of Employment and Labour Relations)*. The decision is currently under appeal. **In the fall of 1996, the Minister of Environment and Labour announced that the Newfoundland Code would be amended to include sexual orientation. To date, no legislation to that effect has been introduced.**

In April 1994, in another judgment similar to the *Haig* ruling, the Alberta Court of Queen's Bench found that that province's *Individual's Rights Protection Act* violated section 15 of the Charter as it did not include a prohibition of discrimination on the basis of sexual orientation; the court ordered that the ground be "read in" to the Act. In February 1996, this ruling was overturned by a majority decision of the Alberta Court of Appeal, which found that, although sexual orientation has been found to be an analogous ground under the Charter, the omission of that ground in the province's human rights statute does not violate section 15. In the view of the majority, the Act's constitutionality is not dependent on its emulating section 15 of the Charter in all respects. The dissenting justice considered that legislatures cannot elude Charter scrutiny by refusing to act. In her view, the silence or omission does amount to the drawing of a distinction within the meaning of section 15, and does result in discrimination contrary to that provision based on the analogous ground of sexual orientation. **The appeal of this decision will probably be heard by the Supreme Court of Canada in the fall of 1997 (*Vriend* v. *Alberta*).**

The absence of legal protection in provincial human rights statutes does not preclude the development of programs to counter problems faced by lesbians and gay men. At the local level, for example, in February 1997 the Calgary public school board adopted guidelines for ensuring the safety of homosexual students through heightened awareness of harassment and violence; the guidelines include instruction to teaching staff and counselling for students.

Relatively few decisions regarding complaints of discrimination on the basis of sexual orientation have been rendered under provincial human rights statutes. This is due in part to the relative recency of legislative amendments in most jurisdictions, although it may also reflect the reluctance of many lesbians and gay men to file complaints. In Quebec, a number of cases since 1977 have involved the denial of services on the basis of sexual orientation. In the most recent, a camping ground's policy of never registering two or more adults of the same sex, except as part of a family, was found to discriminate indirectly on the basis of sexual orientation since, by definition, it excluded all gay or lesbian couples (*Commission des droits de la personne* v. *Camping et plage Gilles Fortier Inc.*). Cases are emerging in the other provinces as well. In Ontario, for example, a February 1993 ruling of an Ontario board of inquiry ordered compensation for a lesbian employee fired because of her sexual orientation (*Waterman* v. *National Life Assurance Co. of Canada*). In 1994 and 1995 respectively, boards of inquiry in Saskatchewan and Ontario upheld complaints of discrimination based on the refusal of municipal authorities to issue proclamations or permits related to Gay Pride activities. In 1994, two Ontario boards of inquiry dealing with complaints alleging harassment on the basis of sexual orientation, one in relation to accommodation and one in relation to the workplace, came to conflicting decisions on the question of whether such harassment was "covered" under the Ontario Code (*Crozier* v. *Asselstine*; *A.* v. *Colloredo-Mansfield (No. 3)*). In June 1995, an Ontario board dismissed the complaint of a gay couple who alleged discrimination and harassment in accommodation based on their sexual orientation (*Grace* v. *Mercedes Homes Inc.*).

Advocates for the explicit inclusion of sexual orientation as a prohibited ground of discrimination in human rights legislation stress fairness and equality issues. They point out

that such inclusion need not entail any approval or encouragement of lesbian or gay lifestyles. It does, however, accord an element of legal protection to individuals. At its most basic, it means that people will not lose their jobs, or be denied accommodation or services solely because of their sexual orientation; if such discrimination is alleged, access to an administrative remedy through the Canadian Human Rights Commission or its provincial analogue is available. Nevertheless, there are those who feel that the inclusion of sexual orientation as a prohibited ground of discrimination may have unexpected implications and create broader rights.

Some who have opposed extending the prohibited grounds of discrimination perceive homosexuality to be a "sexual preference," or choice, and therefore not analogous to the traditionally protected grounds, such as colour, sex, and so forth. To rebut the current theory that homosexuality is not a chosen condition, it is argued that following a gay or lesbian lifestyle, or being open about one's sexuality is a matter of choice. Those favouring inclusion of sexual orientation argue, on the other hand, that making religious observance a part of one's life is also a matter of choice, yet religion has long been recognized as a prohibited ground of discrimination.

The term "sexual orientation" itself, which appears to be neutral, like "gender" or "race," is interpreted by some as broad enough to include paedophilia and other sexual proclivities not generally intended to be covered. However, prohibiting discrimination on the basis of sexual orientation in human rights legislation does not affect *Criminal Code* prohibitions of certain sexual activities, for instance, those between adults and minors. Although these criminal prohibitions could, theoretically, be challenged under section 15 of the *Canadian Charter of Rights and Freedoms*, it is likely that in such cases the courts would either fail to find a Charter violation or would use section 1 of the Charter to uphold the prohibitions. While there are no known cases in which "sexual orientation" has been interpreted so as to protect paedophilia, it has been argued that such challenges could be avoided by defining the term. Others respond that this would be superfluous in light of the courts' clearly expressed understanding that "sexual orientation" is limited to heterosexuality, homosexuality and bisexuality.

B. Same-Sex Spouses

The treatment of gay and lesbian couples highlights specific issues related to discrimination on the basis of sexual orientation. For example, marriage between two individuals of the same sex is currently not permitted in Canada. In March 1993, the Ontario Divisional Court, in a 2-1 decision, ruled that in Canadian law a marriage can take place only between a man and a woman, and denied a Charter challenge by two men who had been denied a marriage licence by the province. This case is under appeal to the Ontario Court of Appeal (*Layland and Beaulne* v. *Ontario*).

There are other ways in which same-sex relationships are not recognized. Statutes commonly employ the word "spouse" as the basis for allocating rights, powers, benefits and responsibilities to partners. Some Acts define "spouse" as either the man or the woman who together make up a married couple. In recent years, the definition of spouse in many statutes has been amended to accord legal status to unmarried heterosexuals cohabiting in a relationship of some permanence, often defined as one to three years. This is both a reflection of the growing public acceptance of unmarried couples and a recognition of reality. In the absence of a legislative definition, judges have generally relied on "common understandings" and dictionary definitions to interpret "spouse" as meaning one of a man and woman living together, married or unmarried. In no case, however, has legislative recognition of unmarried cohabitation been extended to same-sex couples. Canadian law continues to define "spouse" uniformly in exclusively heterosexual terms; in other words, "spouses" are deemed to exist only in heterosexual relationships.

1. Case Law

Questions have arisen as to whether these limitations constitute discrimination, and whether they can be successfully challenged under human rights legislation or the *Canadian Charter of Rights and Freedoms*. In recent years, numerous legal cases have addressed the question of whether the term "spouse" applies to same-sex partners. Several cases have turned on the interpretation of collective agreements or wording in specific statutes or regulations. While rulings in recent court challenges to federal and provincial laws by gays

and lesbians have not been consistent, an emerging body of jurisprudence provides some guidance.

One of the earliest cases was *Andrews* v. *Ontario (Ministry of Health)*, a section 15 Charter case in which a woman sought a declaration to have her lesbian partner provided with OHIP dependant's coverage under the *Ontario Health Act*. The court rejected the application on the basis that "spouse," which was undefined in the legislation, always refers to a person of the opposite sex.

An opposite conclusion was reached in *Knodel* v. *British Columbia (Medical Services Commission)*, a case in which the B.C. Medical Services Commission had denied medical coverage to the petitioner's same-sex life partner. Rowles J., of the B.C. Supreme Court, concluded that, since the current definition of "spouse" in the Act did not include two persons living in a homosexual relationship, the petitioner's right to equality under section 15(1) of the Charter was being infringed on the basis of sexual orientation. Furthermore, the section 15 infringement was not justified under section 1 of the Charter. The remedy that was "appropriate and just in the circumstances" within the meaning of section 24(1) of the Charter was a declaration that same-sex couples should be included in the definition of "spouse" in the Regulations under the *Medical Service Act*.

In *Veysey* v. *Correctional Service of Canada*, a prison inmate and his homosexual partner were denied participation in the Private Family Visiting Program. The Trial Division of the Federal Court quashed that denial on the basis that it violated section 15(1) of the Charter on the ground of sexual orientation. The Federal Court of Appeal dismissed the appeal on the basis that the relevant Directive's reference to common law partners opened the door to applications by common law partners of the same sex. It specifically refrained from dealing with the broader question of whether common law partners of the same sex are common law spouses under the Charter.

Many of the decisions concerning same-sex benefits arise in the employment context. In *Canada (Attorney General)* v. *Mossop* a federal civil servant was denied bereavement leave to attend the funeral of his homosexual partner's father. The collective agreement granted such leave only to heterosexuals who had lived together for at least a year. Mossop, who had lived with his partner for nine years, complained to the Canadian Human

Rights Commission, arguing that he had been discriminated against on the basis of his "family status." A single-member Tribunal, appointed under the *Canadian Human Rights Act*, considered that the homosexual relationship between Mossop and his partner fell within the meaning of "family status" under the Act. The Federal Court of Appeal concluded, however, that the Tribunal had erred in its decision. One of the judges stated that, according to the legislative history of the term "family status," Parliament had intended to limit that prohibited ground of discrimination so that discrimination based on sexual orientation would not be included. Because the parties had not raised the issue, the Court of Appeal explicitly refrained from expressing an opinion on the question of whether the absence of "sexual orientation" from the grounds of discrimination prohibited under the *Canadian Human Rights Act* violated the Charter. In February 1993, in a 4-3 decision, the Supreme Court of Canada dismissed an appeal from the Federal Court judgment. In the result, Mossop's claim of discrimination on the basis of "family status" was rejected. The Court, however, did not expressly decide the fundamental question of what protection, if any, is afforded to homosexuals under the Charter. The decision rested on differing views of Parliament's intent, and of the interpretation to be given to the term "family status."

At the provincial level, in September 1992, a majority ruling of a board of inquiry appointed under the Ontario *Human Rights Code* found, in the case of *Leshner* v. *Ontario (Ministry of the Attorney General)*, that the province's denial of survivor benefits to same-sex partners of government employees violated section 15 of the Charter. The issue involved an apparent contradiction in Ontario's human rights law: although the Act prohibited discrimination on the basis of sexual orientation, it also defined marital status and hence, the right to survivor benefits, in terms of individuals of the opposite sex. The board therefore ordered that the Code's definition of marital status be "read down" by omitting the words "of the opposite sex." It also ordered the Ontario government to give gay and lesbian couples the same benefits under its employee pension plan as were available to heterosexual couples, notwithstanding the fact that the federal *Income Tax Act* does not permit the registration of pension plans providing for same-sex spouses. In the board's view, the cost of extending pension coverage to same-sex spouses would be "small if not minimal" and, in any event, "the achievement of social equity demands a price." The board invited the Ontario government to

challenge the federal government's taxation policy. The *Leshner* decision was viewed as one with potentially far-reaching implications.

In July 1993, in a case analogous to *Leshner*, another Ontario Human Rights Commission board of inquiry ruled that the denial of medical benefits to same-sex spouses violated the Ontario Code's prohibition against discrimination on the basis of sexual orientation. The one-member board did not consider Charter arguments and in May 1994, the Divisional Court of Ontario reversed this decision, commenting that the majority in *Leshner* had correctly interpreted the relevant sections of the Code (*Clinton* v. *Ontario Blue Cross*).

Other employment-related decisions pertain directly to labour relations *per se*. In the federal sphere, these typically concern grievances lodged under the *Public Service Staff Relations Act* or the *Canada Labour Code*, to contest employers' denial to same-sex couples of various "spousal" benefits such as family-related and bereavement leave or health benefits. With the exception of a ruling upholding a refusal to grant a gay public servant marriage leave with pay (*Hewens* v. *Treasury Board*), since the landmark 1992 *Haig* ruling decisions rendered by grievance adjudicators and arbitrators have, generally speaking, referred to that ruling in finding that grievors have been discriminated against on the basis of sexual orientation under the *Canadian Human Rights Act* as well as anti-discrimination provisions of the applicable public service collective agreements (*Lorenzen* v. *Treasury Board*; *Canada Post Corporation* v. *Public Service Alliance of Canada* (Guévremont grievance); *Canadian Telephone Employees' Association* v. *Bell Canada*; *CBC* v. *Canadian Media Guild*; *Yarrow* v. *Treasury Board*).

In October 1994, in a non-employment-related decision, an Ontario human rights board of inquiry ordered the provincial Ministry of Transportation to change its regulations to ensure that same-sex couples are treated the same as common law heterosexual couples (*Coles and O'Neill* v. *Ministry of Transportation*).

In November 1994, the Supreme Court of Canada heard arguments in the case of *Egan* v. *Canada*, a 1989 challenge to the spousal provisions in the *Old Age Security Act*. The case provided the Court with its first direct opportunity to consider a sexual orientation Charter case. The legislation in question provides for a spousal allowance where one spouse is over 65 years of age and is a pensioner under the Act, the other is between 60 and 64, and the

couple's combined income falls below a given amount. The allowance is available to opposite sex couples who have cohabited for a year or more, but is never available to same-sex couples. A gay couple, together for over 45 years but denied the spousal allowance, launched a section 15 Charter challenge to the legislation in 1989. In 1991, the Federal Court, Trial Division, rejected their claim. The judge considered that, notwithstanding the government's concession that sexual orientation was an analogous ground for section 15 purposes, the Act's distinction between homosexual and heterosexual couples was not based on sexual orientation but rather on the plaintiffs' belonging to the "non-spousal couple category." In April 1993, this decision was upheld by the Federal Court of Appeal in a 2-1 ruling. All Federal Court judges acknowledged that, had Nesbit been a woman, he would have been entitled to the spousal allowance.

In May 1995, the Supreme Court of Canada dismissed the appeal of Egan and Nesbit by a final margin of 5-4. The decision contains three important findings. In the first, the Court was unanimous in ruling that, as lower courts had been finding, sexual orientation is an analogous ground that triggers section 15 protection, thus settling that question authoritatively. In the second, a 5-4 majority of the Court found that the spousal definition at issue discriminates on the basis of sexual orientation, infringing section 15 of the Charter. In the third and determinative finding, a different 5-4 majority also found the discrimination was justified under section 1 of the Charter. This conclusion appeared to be based, at least in part, on the view that the Court should be reluctant to interfere with Parliament's choice in respect of a socio-economic piece of legislation such as the Act in question. One member of the majority also based the finding of section 1 justification on grounds that the prohibition of discrimination against gays and lesbians is "of recent origin" and is "generally regarded as a novel concept," thus appearing to suggest that the outcome might not necessarily be the same in future cases.

Repercussions of this Supreme Court of Canada decision began to be felt virtually immediately. In June 1995, the Manitoba Court of Appeal allowed the appeal of a gay Manitoba government employee who had been unsuccessfully litigating the same-sex benefits issue under the provincial *Human Rights Code* for well over a decade. The appeal arose from a February 1992 Queen's Bench ruling declining to interfere with an adjudicator's

decision to dismiss his complaints based on family status and sexual orientation. In finding for the appellant, the Court stated that, although the *Egan* case had concerned section 15 of the Charter, while the present appeal was concerned with provincial human rights legislation, "the reasons of the majority [in *Egan*] are determinative of the issue in this case". The Manitoba Code does not contain a general qualifying provision analogous to section 1 of the Charter, but it does have an internal qualifying section under which discrimination for which *bona fide* and reasonable cause exists may be permitted. The Court thus ordered that the case be returned to the adjudicator to enable a determination as to the applicability of this qualifying section. **The adjudication hearing is scheduled for March 1997 (*Vogel* v. *Manitoba*).**

In addition, in July 1995 the Canadian Union of Public Employees' (C.U.P.E.) argued a section 15 Charter challenge to provisions in the federal *Income Tax Act* which prevent the registration of pension plans that extend benefits to same-sex couples. Federal government lawyers maintained that the *Egan* decision should determine the outcome and that it was up to Parliament, rather than the courts, to decide when society is ready to extend benefits to homosexual couples. C.U.P.E. argued that the basis for justifying the denial of benefits in the *Egan* case should not be applicable because, unlike old age security benefits, the union pension plan is funded by the employer and employees, not the government. In September 1995, the Ontario Court (General Division), noting that the case was indistinguishable from *Egan* on the discrimination issue and also that government lawyers conceded this point, found the definition of "spouse" in the *Income Tax Act* to be in violation of section 15. The judge also ruled, however, that the case was not to be distinguished from *Egan* with respect to section 1 justification. In her view, the fact that different benefit schemes were involved did not affect the outcome as both schemes are part of an overall federal retirement income system. Consequently, the "opposite sex" definition of "spouse" in the *Income Tax Act* was constitutionally valid. **The appeal of this decision is scheduled for October 1997 (*Rosenberg* v. *Canada (Attorney General)*).**

In June 1996, the Canadian Human Rights Tribunal issued its first ruling under the *Canadian Human Rights Act* arising from the denial of same-sex benefits to homosexual federal government employees. In *Moore and Akerstrom* v. *Treasury Board*, the Tribunal concluded, based on the *Haig* and *Egan* decisions, that "it is clear that sexual orientation is a

prohibited ground of discrimination both under s. 15 of the Charter and s. 3 of the CHRA." On the question of whether the denial of spousal benefits constitutes discrimination based on sexual orientation, the Tribunal again relied principally on *Egan* in concluding that

> It is now crystal clear that the law is that denial of the extension of employment benefits to a same-sex partner which would otherwise be extended to opposite-sex common-law partners is discrimination on the prohibited ground of sexual orientation.
>
> It is equally clear ... that the inclusion of a definition of "spouse" which excludes same-sex partners in legislation or collective agreements or regulations by the government so as to deny such benefits offends the Charter and the *Canadian Human Rights Act* and constitutes discrimination prohibited by both.

The Tribunal distinguished between the social policy role of government in *Egan* and the role of government as employer in the present case. Furthermore, "here we are not dealing with discretionary social benefits - these are earned benefits."

The Tribunal's order required that the respondents immediately cease applying any provision that discriminates on the basis of sexual orientation in any collective agreement or other joint policy or plan, including health and dental care plans. It further ordered the respondents to provide the Tribunal with "an inventory of all legislation, regulations, directives, etc. [excepting pension laws] which either contain definitions of common-law spouse which discriminate against same-sex common-law couples or in some other way operate ... to continue the discriminatory practice based upon sexual orientation in the provision of employment-related benefits." The government is seeking judicial review on this point, on the basis that such an order exceeded the Tribunal's jurisdiction, and will also argue that the monetary award ordered by the Tribunal covers a period predating judicial recognition of sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act* and should be reduced. **The hearing is scheduled for May 1997.**

On 13 September 1996, in a second non-Charter case, a different panel of the Canadian Human Rights Tribunal dismissed a complaint of discrimination under the *Canadian Human Rights Act* arising from Air Canada's failure to extend survivor pension benefits to the same-sex partners of company employees. The Tribunal's approach differed from that of

tribunals and courts in previous same-sex benefits cases discussed above, and distinguished the *Haig* and *Egan* decisions. It did not consider that the 1992 *Haig* decision had finally settled the question of whether sexual orientation was a recognized prohibited ground of discrimination under the federal statute; further, even if the *Egan* decision had, by implication, brought sexual orientation into the *Canadian Human Rights Act* as of May 1995, recognition of the ground prior to the adoption of Bill C-33 in June 1996 was limited. In the Tribunal's view, the company's pension program should not be held to a higher standard than that applied to federal government programs by the Supreme Court in *Egan*. In addition, even if a *prima facie* case of discrimination had been established, Air Canada had been justified in not providing an alternative same-sex plan in light of the absence of legislative amendments and other technical considerations. The Tribunal noted that "the result might well have been different" had the matter been brought as a Charter challenge to the relevant opposite sex definitions of "spouse" and urged the federal government "to act swiftly to amend the legislation that prevents employers such as Air Canada from extending pension benefits to same-sex spouses." **The Canadian Human Rights Commission's application for judicial review of the Tribunal's decision is expected to be heard in June 1997 (*Laessoe* v. *Air Canada*).**

Also in September 1996, an Ontario board of inquiry upheld the discrimination complaint of two municipal employees based on the denial of same-sex spousal benefits under various benefit-conferring statutes. The board found the opposite sex definitions of "spouse" and "marital status" in the Ontario *Human Rights Code* and employment benefit-related provincial legislation to be in violation of the complainants' section 15 Charter rights, and not saved by section 1. In making this finding, the board distinguished the facts of the complaint from those in the *Egan and Nesbit* case, in that the benefits in question "are not social benefits but employment benefits." Remedies issued included an order requiring that the Code's definitions be "read down" to eliminate their opposite sex character and render them constitutional. The board also ordered that opposite sex definitions in the provincial *Municipal Act* and *Municipality of Toronto Act* be similarly read down to comply with the "constitutionally-corrected"

Code. It directed the province both to interpret the *Municipal Act* definition of "spouse" as being inclusive of same-sex spouses for purposes of insured and uninsured benefits and to inform all municipalities of this interpretation. However, the Board declined to order a costly "off-side" pension arrangement that would have provided same-sex survivor benefits comparable to those available to opposite sex surviving spouses, noting that in the area of pension benefits "the stumbling block to equality is the opposite sex definition in the [federal *Income Tax Act*]." Analogous orders to those described above, in connection with pension benefits, and including reading down of opposite sex definitions in the provincial *Pension Benefits Act*, *Ontario Municipal Employees Retirement System Act* and taxation statute, were therefore made contingent upon a change in the definition of "spouse" in the federal *Income Tax Act*. Although this decision has been appealed, in February 1997 the Chairman of Metro Toronto agreed to the payment of same-sex health benefits, suggesting that the continued participation of Metro Toronto in the proceedings may be doubtful (*Dwyer and Sims* v. *Toronto (Metropolitan)*).

2. Extra-Judicial Developments

A number of extra-judicial developments have also occurred in the area of same-sex benefits or recognition of status. In September 1993, a report of the Ontario Law Reform Commission on the treatment of "cohabitants" under the province's *Family Law Act* proposed reforms aimed at entitling same-sex couples to the rights and responsibilities of married or cohabiting heterosexuals. The report recommended, for example, that a Registered Domestic Partnership scheme be introduced to provide same-sex couples and other cohabitants the option of incurring the economic rights and obligations associated with marital status without affecting the institution of marriage. The report also recommended that the *Family Law Act* be amended to allow same-sex couples to enter into cohabitation, separation and parenting agreements.

In May 1994, the former NDP government of Ontario introduced Bill 167, the Equality Rights Statute Law Amendment Act, 1994. Designed to remove disparities in the treatment of same-sex and common-law heterosexual couples in approximately 60 Ontario

statutes, the bill was defeated at second reading by a vote of 68-59, following a very public and acrimonious debate.

In a June 1994 report, the Quebec Human Rights Commission also recommended the extension of benefit plans to same-sex couples, and further recommended that all Quebec statutes referring to common law spousal status be amended "so that homosexuals common-law spouses have the same rights as heterosexuals common-law spouses". In July 1995, the Parti Québécois government mandated an interdepartmental committee to study the financial and administrative implications of granting same-sex couples legal recognition. In June 1996, *An Act to amend the Charter of Human Rights and Freedoms and other legislative provisions*, was enacted by the National Assembly and came into force. The Act eliminates sexual orientation as a justifiable basis for disentitlement or differentiation in respect of retirement, pension and insurance plans, and other social benefit plans or schemes.

In April 1996, the Law Reform Commission of Nova Scotia issued a Discussion Paper containing suggestions for reforming the province's law dealing with the economic consequences of relationship breakdown. In place of the existing *Matrimonial Property Act*, the Commission proposed a new *Family Law Act* which would "recognize a diversity of family forms ... be available to opposite sex and same sex couples in cohabitation relationships," and automatically apply to "any two persons who are recognized in their community as cohabiting in an intimate relationship of some permanence." In the Commission's view, "there is no valid legal or policy reason for distinguishing between people on the basis of sexual orientation or marital status in family property legislation."

Currently, same-sex spousal recognition is most commonly found in the employment sphere. Over recent years, a steadily increasing number of private employers, including many major corporations, as well as some federally-regulated employers, have been providing dental and health care benefits to same-sex couples. A number of provincial, territorial and municipal governments have also adopted policies extending health-related and other benefits to same-sex couples. For example, in December 1990, the Ontario government broadened the meaning of the term "spouse" in its benefit plan, thus entitling the same-sex partners of government employees to dental, medical and health insurance benefits. Other

provincial and territorial governments with similar policies in place are British Columbia, New Brunswick, Nova Scotia, Quebec and the Yukon. By way of an October 1994 Order in Council, retroactive to July 1992, Ontario also implemented the *Leshner* decision requiring coverage for same-sex couples under the government employment pension scheme equivalent to that provided heterosexual couples. Because the federal taxation statute does not register pension plans that recognize same-sex spousal status, an "offside" plan was required for this purpose. Municipalities that provide at least some same-sex benefits to their employees include Halifax, Montreal, Ottawa, Hamilton, Toronto, Calgary and Vancouver.

At the federal level, the Treasury Board, in November 1995, modified its interpretation of a number of provisions in collective agreements to which it is a party as employer, thereby entitling the same-sex "partners" of public service employees to some of the benefits available to common law spouses. Areas affected were family-related, spousal relocation and bereavement leaves, as well as foreign service, isolated post and relocation directives. This policy shift enabled the settlement of nine sexual orientation complaints lodged against the Treasury Board. In December 1995, the Board of Internal Economy of the House of Commons mirrored the Treasury Board decision by extending bereavement and family-related leave benefits to the same-sex partners of House of Commons employees. Then, in July 1996, the Treasury Board further announced that it would comply with the "cease and desist" order of the Canadian Human Rights Tribunal in *Moore and Akerstrom* and would extend medical and dental benefits to partners of gay and lesbian federal employees. Pension benefits were not affected by the latest policy change.

The *Moore and Akerstrom* ruling was also relevant to Revenue Canada's September 1996 decision to modify its interpretation of the *Income Tax Act*'s definition of "private health services plan." Historically, coverage of same-sex couples has been precluded by that definition, with the result that employer-paid medical and dental benefits to opposite sex couples were not subject to tax, while the same benefits to same-sex couples were taxable. Under the modified technical interpretation, these benefits to same-sex couples will also be treated as tax-free.

In a number of provinces, cohabiting same-sex partners are no longer treated as individuals for purposes of social assistance legislation. These include British Columbia,

Saskatchewan, New Brunswick and Prince Edward Island. Such reforms mean that the income of cohabitees or dependants, including same-sex partners, is taken into account in allocating social assistance benefits; the reforms do not represent recognition of same-sex spousal status as such.

Under such reforms, same-sex couples may be treated differently by different levels of government. In one reported instance, the British Columbia social services ministry stopped paying for the medications of an HIV-positive gay man cohabiting with his same-sex partner, arguing that, as he was part of a couple, his partner was responsible for the costs. Under the federal *Income Tax Act*, however, the partner is not entitled to deduct these medication costs, as he could those of an opposite-sex spouse, because the Act does not consider the partners to be a couple.

The denial of spousal benefits to same-sex couples has been criticized on policy grounds. Advocates argue that, as taxpayers, same-sex couples are being denied public benefits, while, in return for their direct contributions to certain funds, they receive no survivor benefits or spousal pension rights; in fact they are subsidizing heterosexual couples. This is considered unfair, particularly to those in long-term same-sex relationships. On the other hand, historical, moral, and social reasons are cited for the state's traditional non-recognition of homosexual couples. Some critics continue to argue that homosexual rights undermine the traditional family and family values. Concerns about the financial costs of extending such benefits have also been expressed, although statistical and actuarial information on this issue tends to suggest the cost factor may not be significant. Some have also expressed uneasiness on the basis that not all same-sex relationships are equally deserving of recognition. Moreover, some gay and lesbian couples (like some heterosexual couples) do not want either the legal obligations or the benefits that flow from spousal status. Some argue that the whole issue of benefits based on sexual partnership, whether of the same or the opposite sex, should be re-examined.

C. Other Legal Issues

A variety of other legal issues affect lesbians and gay men; some flow from those discussed above. They include military practices, criminal law issues, custody and adoption of children, other family law issues, violence, customs, immigration, issues related to AIDS and medical treatment, and discriminatory application of laws. A number of these issues have come before the courts.

In October 1992, the Canadian Armed Forces announced that enlistment and promotion in the military would no longer be restricted on the basis of sexual orientation. This policy move was in accordance with an out-of-court settlement between the federal government and a former lieutenant who had resigned after admitting to having had a lesbian relationship. By the terms of the Federal Court judgment agreed to by the parties, the military's previous policy governing the service of homosexuals was contrary to the *Charter of Rights and Freedoms* (*Douglas* v. *The Queen*).

In March 1995, a Federal Court judge set aside a deportation order against an individual convicted of sodomy in the United States. The purportedly equivalent offence at section 159 of the *Criminal Code*, upon which the validity of the deportation order hinged, was found to discriminate against young homosexuals on bases of sexual orientation and age. Under section 159, anal intercourse is an indictable offence, except between husband and wife and consenting adults over eighteen. This ruling is under appeal (*Halm* v. *Canada*). In May 1995, the Ontario Court of Appeal also ruled that this *Criminal Code* provision violates section 15 of the Charter. A majority of the Court preferred to limit its finding to one of discrimination based on age. In the view of the minority member of the Court, "the essence of the discrimination is sexual orientation, with age and marital status being tentacles of this form of discrimination" (*R.* v. *M. (C.)*).

Decisions concerning custody and access apply a "best interests of the child" test under which an applicant's sexual orientation is one of many factors to be taken into account. Lesbians and gay men have traditionally encountered problems in obtaining custody of and access to their biological children, and may also be denied access to adoption and to fertility clinics.

There have been developments suggesting that some of these restrictions may be loosening in some jurisdictions. Numerous rulings issued over the past 20 years by courts across the country have declined to deny access to adoption, custody or access on the basis of a parent's homosexuality, although this result is by no means unanimous. In Ontario, several lesbian couples in committed relationships who wished to make joint applications for adoption challenged the constitutionality of provisions of the provincial *Child and Family Services Act*, under which such joint applications are limited to spouses, defined as persons of the opposite sex. One of the partners in each of these cases was the birth mother of the children implicated in the proposed applications. In May 1995, a judge of the Ontario Court of Justice (Provincial Division) found that the definition of "spouse" in the Ontario legislation violated section 15 of the Charter on the basis of sexual orientation and could not be saved under section 1. In the judge's view, the available evidence did not support a conclusion that adoption by homosexual parents could never be in the child's best interests; therefore an absolute bar against joint applications by homosexual spouses was not justified. The judge ordered that the definition of "spouse" be read so as to include persons of the same sex living in a conjugal relationship, and that the joint applications for adoption be allowed to proceed (*K. (Re)*).

In British Columbia, the new *Adoption Act* passed by the Legislative Assembly in July 1995 came into effect as of 4 November 1996. It provides that any two adults, including same-sex couples, may make joint applications tor adoption. Quebec and Saskatchewan also allow homosexual couples to make adoption applications.

In August 1995, the British Columbia Human Rights Council, in its first sexual orientation ruling under the provincial *Human Rights Act*, found that a lesbian couple had been discriminated against by a doctor's refusal to provide them with artificial insemination services (*Potter* v. *Korn*).

Other family law-related developments include a December 1996 majority decision of the Ontario Court of Appeal relating to the opposite sex definition of "spouse" in Part III of Ontario's *Family Law Act*, under which same-sex partners are prevented from applying for spousal support upon relationship breakdown. In this case, both the defendant and the government conceded that the restricted definition violated

section 15 of the Charter on the basis of sexual orientation, but argued that it nevertheless represented a reasonable limit under section 1. The majority rejected the province's argument that family law reform in same-sex matters is a policy choice rather than a constitutional issue, in view of the fact that the government had made no policy choice to redress the discrimination at issue, but had chosen inaction. According to the majority:

> It is not open to the court to simply avoid the issue on the ground that legislative reform could provide a superior remedy. ... The court must deal with the issue as it presents itself and on the basis of the evidence presented by the parties. The matter must be decided within the constitutional framework which, it is important to remember, has itself been set up through the democratic process.

As had the lower court, the majority of the Court of Appeal concluded that the opposite sex definition failed the section 1 test. Denying same-sex partners access to the remedy of spousal support was not rationally connected to legislative goals of providing for the equitable resolution of economic disputes arising when intimate relationships between financially interdependent individuals break down, and of alleviating the burden on the public purse potentially resulting from such circumstances. The majority also agreed with the lower court that the appropriate remedy was to read the terms "two persons" into the definition in place of unconstitutional opposite sex terms; however, it suspended this remedy for one year to enable the Legislature to address possible legal and policy ramifications flowing from it. In discussing this remedial choice, the majority expressly noted that

> The extent to which any of the [other opposite sex spousal definitions in Ontario statutes that would have been modified by Bill 167] would likely withstand constitutional scrutiny in light of the unconstitutionality of [the definition in the *Family Law Act*] ... is a matter which the Legislature may wish to address. If left up to the courts, these issues can only be resolved when raised in a piece-meal fashion in the context of individual cases at great costs to private litigants and to the public purse.

Application for leave to appeal this decision has been filed with the Supreme Court of Canada (*M.* v. *H.*).

Violence directed at gays and lesbians is also an issue that has emerged in recent years, either because such violence is increasing or because it is being reported more frequently. In November 1993, the Quebec Human Rights Commission convened the first public inquiry into discrimination and violence against gays and lesbians. The hearings acquired a high profile as a result of the murders of at least 15 homosexual men in Montreal between 1989 and 1993. By June 1995, the number had reached 30. Police in other cities have also identified "gay bashing" as an issue needing to be addressed. **Studies conducted in Vancouver in 1992 and 1995 concluded that each year hundreds of gay men are assaulted in that city, and that a third of gay men and lesbians have been assaulted at some point in their lives. In December 1996, the attack on a gay municipal politician received high profile coverage as another instance of "gay-bashing" in Vancouver.** Violence or other criminal activity directed against gays has also been recognized as an important issue by Parliament, albeit not without controversy, in a recent sentencing bill.

Books and periodicals imported to gay and lesbian bookstores in Canada have allegedly been subjected to unduly intense scrutiny by Customs officials, and have often been seized as obscene within the *Criminal Code* definition. In the autumn of 1994, the British Columbia Civil Liberties Association, the Little Sisters Book & Art Emporium in Vancouver and its owners challenged provisions of the *Customs Act*, the *Customs Tariff* and its Schedule VII which authorize this system of "prior restraint." They argued that the system violated the Charter's section 2(b) freedom of expression guarantee, and that the law's application discriminated against the authors and consumers of the prohibited material on the basis of their sexual orientation, contrary to section 15. In a January 1996 ruling, the Supreme Court of British Columbia concluded that although the law itself was constitutional, systemic deficiencies in the law's application and patterns of arbitrary and improper practices by Customs officials had resulted in the unconstitutional prohibition of admissible, i.e., non-obscene, materials. In the result, the Court issued a declaration that the legislative provisions at issue had been construed and applied in violation of section 2(b) and section 15. The

decision has been appealed. In March 1996, the plaintiffs were granted an interim injunction to enjoin the continuing practice of systematic inspection "until the federal Crown satisfies the Court that the discretion of customs officers ... is guided by appropriate standards" (*Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*).

Several cases in recent years have concerned the refugee status of homosexuals claiming to have been persecuted because of their sexual orientation. For example, in 1994 a panel of the Convention Refugee Determination Division of the Immigration and Refugee Board granted a Polish man Convention refugee status, finding that he had been subject to persecution both because he was gay and because of his HIV-positive status. In January 1995, a gay Venezuelan man who had been tortured because he was gay, was also recognized as a Convention refugee. In a 1993 decision, the Supreme Court of Canada ruled that membership in a "particular social group" as a basis of persecution under the Convention refugee definition includes groups defined by an innate, unchangeable characteristic, such as sexual orientation (*Canada (Attorney General)* v. *Ward*). The significance of homosexuality as an issue in Convention refugee claims has been apparent in Federal Court rulings setting aside deficient refugee board decisions (*Pizarro* v. *Canada (Minister of Employment and Immigration)*; *Dykon* v. *Minister of Employment and Immigration*). In these cases, the refugee claims are returned to the Convention Refugee Determination Division for redetermination in accordance with the judges' directions.

Federal immigration regulations restrict spousal family class membership for immigration purposes to married couples, thereby precluding sponsorship of same-sex or opposite sex common law partners. Nevertheless, immigration guidelines in effect since June 1994 provide that this restriction does not act as a total bar to applications for permanent residence by same-sex partners. For example, the normal selection system may be applied to determine whether an immigration visa should be issued to same-sex or opposite sex common law partners. Where this system is not viable, humanitarian and compassionate factors may be considered, including the existence of a stable relationship with a Canadian citizen or permanent resident, and whether undue hardship would result from separation.

D. Conclusions

The full impact of the *Canadian Charter of Rights and Freedoms* and, in particular, of the equality rights provision at section 15, has yet to be felt. Certainly, issues involving gay and lesbian rights may only have begun to be addressed. While many observers feel it would be preferable to achieve changes through governmental actions and policy decisions rather than through the courts, politicians have tended to view such changes as politically risky in light of the vocal opposition of some electors. The growing body of sexual orientation and same-sex benefits jurisprudence shows mixed results. Notwithstanding this diversity of results, however, the cases reviewed illustrate clearly that courts and tribunals are prepared to consider carefully Charter challenges and human rights complaints based on sexual orientation.

Homosexuality was long considered to be deviant behaviour; it was abhorred and stigmatized by society and categorized as a crime. Individuals believed to have homosexual feelings were ostracized. Despite continued resistance of certain religious groups and others, societal attitudes to homosexuality have undergone considerable evolution since the end of the Second World War, and particularly in the last 20 years or so, in light of legal and medical developments.

PARLIAMENTARY ACTION

Parliament decriminalized homosexual activity between consenting adults in 1969, while the *Immigration Act, 1976* removed homosexuals from classes of persons prohibited from entering Canada. Until recently, little further legislative activity at the federal level addressed legal issues related to homosexuality. None of the numerous Private Members' bills introduced in the House of Commons since 1980 to prohibit discrimination on the basis of sexual orientation proceeded beyond first reading; proposed amendments to other bills to remove various forms of such discrimination were also unsuccessful.

It was not until December 1992, International Human Rights Day, that then Minister of Justice, the Hon. Kim Campbell, introduced a package of amendments to the

Canadian Human Rights Act in the House of Commons (see Library of Parliament, Legislative Summary LS-156). Bill C-108 would have added sexual orientation as a prohibited ground of discrimination; at the same time, however, it would have defined marital status explicitly for the first time, using exclusively heterosexual terms -- that is, as involving two persons of opposite sexes.

Supporters of the bill argued that, while many Canadians opposed discrimination on the basis of sexual orientation in areas such as housing and employment, they were not in favour of extending benefits to same-sex couples. Others felt that same-sex conjugal relationships should be treated in the same way as common law heterosexual relationships, provided they met the same basic criteria. In February 1993, a coalition of groups representing women, the disabled, and gays and lesbians urged that Bill C-108 be scrapped, calling it a "devastating setback for human rights in Canada."

On 1 December 1992, Senator Noel Kinsella had also introduced Bill S-15 in the Senate of Canada. Entitled "An Act to amend the Canadian Human Rights Act (sexual orientation)," the bill sought to add "sexual orientation" to the enumerated grounds in section 3 of the Act. Senator Kinsella argued that the bill was merely a codification of what had already been established by the courts, and expected that it would be passed quickly. Bill S-15 did pass the Senate without amendment in June 1993, and was introduced in the House of Commons the same month; however, it had not been dealt with when Parliament was dissolved in September 1993 for the general election.

In December 1993, the present Minister of Justice, Allan Rock, indicated that the new Liberal government was committed to rapid change of human rights law to prohibit discrimination on the basis of sexual orientation, and that it would also review entitlements such as pension benefits to determine whether gay and lesbian partners should be treated in the same way as heterosexual couples. In a May 1994 appearance, Mr. Rock further informed the House of Commons Standing Committee on Human Rights and the Status of Disabled Persons that his department was reviewing all federal legislation, regulations and policies that make distinctions on the basis of personal relationships. Rather than extending benefits to same-sex couples *per se*, the government was examining the relevance of concepts of dependency and interdependency for purposes of establishing entitlements to benefits.

Despite the Minister of Justice's commitment to table amendments to the *Canadian Human Rights Act* expeditiously, in early 1995 the Prime Minister indicated that Bill C-41 would have to be dealt with first. Under Bill C-41, which amends the *Criminal Code*'s sentencing provisions, evidence that a crime has been motivated by bias, prejudice or hate based on a number of listed personal characteristics constitutes an aggravating circumstance for which a sentence should be increased. The inclusion of sexual orientation among those personal characteristics sparked considerable opposition, in part owing to a fear that the step would lead to inclusion of sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act*, or otherwise contribute to a perceived erosion of traditional family values. Bill C-41 received Royal Assent on 13 July 1995, and came into force on 3 September 1996.

In September 1995, a Private Member's motion that, in the opinion of the House, the government should take the steps necessary for the legal recognition of same-sex spouse, was defeated by a vote of 124 to 52.

In February 1996, Senator Noel Kinsella introduced Bill S-2 in the Senate. Entitled "An Act to amend the Canadian Human Rights Act (sexual orientation)," the bill was identical to Bill S-15, and was designed to add "sexual orientation" to the prohibited grounds of discrimination in section 3 of the federal statute, as well as to section 16, the statute's affirmative action provision. Under section 16, special programs to reduce disadvantages suffered by enumerated groups are not discriminatory when they improve opportunities respecting goods, facilities, accommodation or employment. Senator Kinsella reiterated his 1992 statement that the bill would give parliamentary approval to a concept that has already been sanctioned by the courts. Bill S-2 received second reading on 26 March 1996 and, following consideration by the Senate Standing Committee on Legal and Constitutional Affairs, was reported back to the Senate without amendment on 23 April. The bill was adopted by the Senate, unamended, on 24 April 1996.

The following week, on 29 April 1996, Justice Minister Rock introduced Bill C-33, An Act to amend the Canadian Human Rights Act, in the House of Commons. Like Bill S-2, Bill C-33 was designed to add "sexual orientation" to the *Canadian Human Rights Act*'s prohibited grounds of discrimination, but it differed from Bill S-2 in two respects: first,

Bill C-33 did not propose amending the Act's affirmative action provision and second, it was preceded by a preamble recognizing the importance of family in Canadian society and affirming that the bill did nothing to alter the family's fundamental role.

The introduction of these two pieces of legislation, and in particular Bill C-33, intensified the long-standing controversy within the public as well as among Members of Parliament over the implications of adding "sexual orientation" to the *Canadian Human Rights Act*. Supporters maintained that the bill was concerned with basic human rights, fairness and tolerance, and was simply intended to prohibit discrimination against gays and lesbians in areas of employment, accommodation and the provision of goods and services. Opponents maintained that, while this might be the intention, the matter was one of morality; notwithstanding the preamble, the effect of introducing sexual orientation as a prohibited ground of discrimination would pave the way for same-sex benefits, marriages and adoption, and the promotion of homosexual lifestyles, thereby undermining the traditional family. In response, it was argued that Bill C-33 merely codified judge-made law, that areas such as marriage, adoption and education came under provincial jurisdiction, and that same-sex issues would be decided by the courts with or without the legislation.

Following intensive hearings before the House Standing Committee on Human Rights and the Status of Persons with Disabilities from 1-3 May 1996, the bill was reported back to the House without amendment. On 9 May, Bill C-33 was given third reading and was adopted in a free vote by a tally of 153 to 76. Reflecting the divisiveness engendered by Bill C-33, 29 government Members voted against it. The bill was introduced in the Senate on 14 May 1996, was adopted on 28 May 1996 unamended, and came into force on 20 June 1996.

On 9 May 1996, the day of Bill C-33's adoption in the House, Réal Ménard, M.P., introduced Private Member's Bill C-282, An Act providing for equal treatment for persons cohabiting in a relationship similar to a conjugal relationship. The bill would require that the term "spouse" in Acts of Parliament be interpreted so as to provide same-sex partners cohabiting in common-law relationships with the same rights as are granted by federal statutes to opposite sex common-law couples.

CHRONOLOGY

1977 - Quebec amended its human rights legislation to prohibit discrimination on the basis of sexual orientation, thereby becoming the first Canadian jurisdiction to do so.

1979 - The Canadian Human Rights Commission, in its annual report to Parliament, recommended that the *Canadian Human Rights Act* be amended to include sexual orientation as an enumerated ground. This recommendation was made in successive annual reports up to and including 1995.

1982 - The *Canadian Charter of Rights and Freedoms* became part of the Constitution of Canada.

1985 - Section 15 of the Charter (the equality rights provision) came into force.

- *Equality for All*, the report of the House of Commons Sub-committee on Equality Rights was tabled. It called for prohibition of discrimination on the basis of sexual orientation in the *Canadian Human Rights Act*.

1986 - The federal government tabled *Towards Equality*, its response to the Sub-committee's report.

1992 - Ontario Court of Appeal decision that the *Canadian Human Rights Act* would in future be read as if it prohibited discrimination on the basis of sexual orientation (*Haig* v. *Canada*).

- Canadian Armed Forces announced an end to restrictions on the enlistment and promotion on the basis of sexual orientation.

- Bill S-15, which would have added sexual orientation as a prohibited ground of discrimination to the *Canadian Human Rights Act* was introduced in the Senate by Senator Noel Kinsella.

- The Minister of Justice tabled Bill C-108, An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof, in the House of Commons on 10 December 1992; the bill would have made "sexual orientation" a prohibited ground of discrimination. The bill died on the Order Paper when Parliament was dissolved in September 1993.

1993 - The Supreme Court of Canada released its decision in *Canada* v. *Mossop*, in which it rejected claims that the term "family status" in the *Canadian Human Rights Act* includes couples of the same sex.

- Bill S-15, was passed by the Senate and introduced in the House of Commons. The bill died on the Order Paper when Parliament was dissolved in September 1993.

1994 - In May, the Ontario government introduced Bill 167, aimed at enlarging the definition of spousal relationships in Ontario statutes ship to ensure that same-sex couples were entitled to the same rights and subject to the same obligations as applied to common law heterosexual couples. The bill was defeated at second reading by a vote of 68-59.

1995 - On 25 May, the Supreme Court of Canada issued its ruling in *Egan* v. *Canada*, the Court's first section 15 Charter decision dealing with sexual orientation and same-sex benefits issues. While all nine members of the Court found sexual orientation to be an analogous ground for section 15 purposes, and a majority of the Court ruled that the opposite sex definition of spouse in the *Old Age Security Act* violated section 15 on the basis of sexual orientation, a majority also found the violation justified under section 1 of the Charter.

- On 13 July, Bill C-41, amending the *Criminal Code* sentencing provisions, received Royal Assent. The legislation ensures stricter penalties for crimes motivated by bias, prejudice or hate based on a number of personal characteristics, including sexual orientation. Bill C-41 came into force on 3 September 1996.

1996 - On 28 February, Senator Noel Kinsella introduced Bill S-2 in the Senate. The bill, which would add sexual orientation as a prohibited ground of discrimination in the *Canadian Human Rights Act*, passed the Senate unamended on 24 April.

- On 29 April, the Minister of Justice introduced Bill C-33, An Act to amend the Canadian Human Rights Act, in the House of Commons. The bill added "sexual orientation" to the *Canadian Human Rights Act*'s prohibited grounds of discrimination. It was passed by the House in a free vote on 9 May, by the Senate on 28 May, and came into force on 20 June.

- On 13 June, the Canadian Human Rights Tribunal upheld a complaint of discrimination based on sexual orientation under the *Canadian Human Rights Act* arising from the denial of same-sex benefits to federal public servants (*Moore and Akerstrom* v. *Treasury Board*). On

15 July, the Treasury Board announced it would comply with the Tribunal's order to grant medical and dental benefits to the same-sex partners of government employees.

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